IN THE

# Supreme Court of the United States

October Term, 1977

No. 77-1308

NATIONAL BROADCASTING COMPANY, INC. and CHRONICLE PUBLISHING CO.,

*Petitioners,*

v.

OLIVIA NIEMI, a minor by and through her guardian Ad Litem,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

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## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

The Petitioners, National Broadcasting Company, Inc. ("NBC") and Chronicle Publishing Co. ("Chronicle") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, First Appellate District, entered in this proceeding on October 26, 1977.

### Opinions Below

The October 26, 1977 opinion of the California Court of Appeal is reported at 74 Cal.App.3d 383, 141 Cal.Rptr. 511 (1977) and is set forth as Appendix A to the Petition. The order of the Court of Appeal denying, without opinion, a petition for rehearing is unreported and is set forth as

Appendix B hereto. The California Supreme Court's January 19, 1978 order denying a hearing to review the Court of Appeal decision is unreported and is set forth as Appendix C hereto. The Memorandum of Intended Decision, the Judgment, and the Findings of Fact and Conclusions of Law of the Superior Court of the City and County of San Francisco, reversed by the Court of Appeal, are set forth as Appendices D, E and F hereto, respectively.

## Jurisdiction

The judgment of the Court of Appeal was entered on October 26, 1977. A timely petition for a hearing to the Supreme Court of California was denied by order entered January 19, 1978 and this Petition has been filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) (1970).

## Question Presented

Do the First and Fourteenth Amendments to the United States Constitution permit the imposition by a state of tort liability on the broadcaster of a dramatic work, on the theory that the broadcaster was "negligent" or "reckless" in presenting the drama because viewers or others might imitate a scene in the drama and commit criminal acts resulting in injury?

## Constitutional Provisions Involved

The First Amendment to the United States Constitution provides, in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."



The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

## Statement of the Case

On September 10, 1974, NBC televised the drama "Born Innocent" to a national television audience. The two hour program was broadcast in the San Francisco area by KRON-TV, a television station owned and operated by Petitioner Chronicle Publishing Co.

The presentation dealt, in fictional dramatic form, with the life of an unwanted child and society's ineffective and, ultimately, oppressive efforts to deal with her plight. It concerned a teenage girl who, unwanted at home, is committed to a reformatory as a runaway. In one segment of the drama the teenage protagonist is subjected to an assault by other female inmates of the reformatory and a "rape" with a blunt instrument is implied.

## Proceedings Below

On October 9, 1974, Plaintiff filed her complaint in this action in the Superior Court of California in and for the City and County of San Francisco. The complaint (Appendix G) is in two counts. In the first, the program "Born Innocent" is referred to and the simulated rape scene described. (¶¶ II, X, XIII) It is alleged that Petitioners (defendants below)* "negligently, carelessly and recklessly" allowed the program to be telecast to the public

* Unnamed sponsors of "Born Innocent" as well as Petitioners were named in the complaint. The action has not been pursued against the sponsors.

in the evening when minors would be likely to watch it (¶¶ XIV, XV)* and that "Defendants . . . knew or should have known that the minds of minors are impressionable and that broadcasting such a scene could cause some minors to imitate such conduct." (¶ XV)

The complaint later alleges that certain minors watched the scene and that "it caused them to decide to do a similar act to a minor" and that as a result of defendants' "negligent, wanton and careless acts" Plaintiff-Respondent and another girl were subjected to an alleged sexual attack on September 13, 1974 by other minors using a Coca-Cola bottle to simulate intercourse. (¶ XVI)

The second purported cause of action repeats the allegations of the first and asserts that defendants "knew that this scene might cause minors to imitate this act and injure a human being; that despite said knowledge [the defendants] wilfully and intentionally televised said program" and that in so doing the defendants "acted maliciously and in reckless disregard of its possible results . . . and plaintiff's welfare and only in concern of their own economic interests." (¶ II)

No theory of liability other than that of imitation is set forth in the complaint. One million dollars in compensatory and ten million dollars in punitive damages are sought.

Petitioners' answer denied all allegations of wrongdoing and asserted, *inter alia,* an affirmative defense of a failure to state a cause of action. (CT 9-12)**

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* Plaintiff-Respondent does not dispute that a warning as to the need for parental guidance in allowing children to view the program was broadcast prior to the showing of the program.

** References to "CT" are to the Clerk's transcript in this case; references to "RT" are to the Reporter's transcript. Both were before the Court of Appeal in this matter. References to "—a" are to the Appendix to this Petition.



Petitioners moved for summary judgment in the Superior Court on the ground that the First Amendment barred recovery and on the further ground that no legal duty was owed to Plaintiff-Respondent (CT 42-65); a copy of the film referred to in the complaint was annexed to the moving papers but was not viewed by the motion judge. (RT 13) The Superior Court denied the motion without opinion. (CT 116) A writ of mandamus or prohibition was sought by Petitioners and denied by the Court of Appeal on August 31, 1976 without reaching the merits of the summary judgment motion. (A copy of this decision is set forth as Appendix H.) That Court did suggest, however, that a California Supreme Court decision which rejected a proffered First Amendment defense in a distinct tort context and which was heavily relied upon by Plaintiff in opposing the motion* was "of doubtful application." (25a)

After denial of the extraordinary writ, the case was set down for trial in the Superior Court. Prior to the impaneling of the jury, Plaintiff made a motion *in limine* to bar all reference to the First Amendment. (CT 132-33) Petitioners moved for dismissal asserting, once again, that the First Amendment barred any cause of action and that Petitioners owed no legal duty to Plaintiff. (RT 5) The trial court indicated that the constitutional issues should be resolved first and viewed the film at that time. Thereafter, after affording an opportunity for further briefing or argument to Plaintiff, and after accepting an offer of proof from Plaintiff (set forth in Appendix I) and treating Petitioners' motion as one for judgment on the issue of law (CT 186; 15a), the trial court rendered a decision

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* *Weirum* v. *RKO General, Inc.*, 15 Cal.3d 40, 539 P.2d 36, 123 Cal.Rptr. 468 (1975).

dismissing the complaint. The Court stated that it "assumed the facts alleged in the complaint to be true" and "took into account the offer of proof by counsel for the plaintiff." (CT 184; 11a)

The Court entered the following conclusions of law:

> "1. Assuming plaintiff's assailants obtained the idea of assaulting her as a result of the telecast of said motion picture, and assuming the other facts alleged in the Complaint and offered to be proved by plaintiff to be true, the law provides no remedy.
>
> "2. Plaintiff's alleged causes of action, and each of them, are barred by the First Amendment to the United States Constitution and Article I, Section 2, of the California Constitution.
>
> "3. Said motion picture is not, in whole or in part, directed to inciting or producing imminent lawless action."* (CT 186a; 16a)

In its opinion rejecting the proffered causes of action, the trial court concluded:

> "The State of California is not about to begin using negligence as a vehicle to freeze the creative arts." (CT 185; 12a)

Plaintiff appealed to the Court of Appeal, First District. That Court reversed the trial court's decision, remanded the matter and directed that a jury be impaneled and that the case proceed to trial (Appendix A); it is with respect to that decision that review by this Court is sought.

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* This third conclusion of law was also made a finding of "constitutional fact." *See* "Finding of Fact" (CT 186a; 16a) and "Memorandum of Intended Decision." (CT 183; Appendix D)



The opinion of the Court of Appeal acknowledged that significant First Amendment protection must be accorded dramatic presentations. The opinion correctly concluded that the question of whether a program "falls within any category of unprotected speech may, where the facts are not disputed, constitute a question of law." (141 Cal.Rptr. at 514; 5a)

Nonetheless, the Court of Appeal rejected the ruling of the trial court that the purported causes of action were barred, as a matter of law, by the First Amendment. The opinion of the Court indicated that issues of fact were present requiring a jury determination under California law, subject only to subsequent judicial "reevaluation of the evidence" (*id.;* 6a) in light of First Amendment considerations.* The Court of Appeal held that:

> "[T]he case is not presently ripe for such a determination, appellant having been deprived of her constitutional right to present before a jury evidence which she contends will show that, ***despite First Amendment protections,*** the showing of the film 'Born Innocent' resulted in actionable injuries. (Cf. ***Weirum*** v. ***RKO General, Inc.*** (1975) 15 Cal.3d 40, 123 Cal.Rptr. 468, 539 P.2d 36.)" (141 Cal.Rptr. at 514; 6a) (emphasis added)

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* The Court did not articulate any factual issue which could have properly barred judgment on First Amendment grounds, but indicated that an issue of fact for the jury was presented as to whether or not the program "advocate[d] or encourage[d] violent and depraved acts" (*id.*; 5a) so as to constitute some form of incitement. It so held despite the fact that neither incitement as such, nor any of its elements, was ever pleaded below (Appendix G); nor was any offer of proof made as to this subject or any of its elements. (RT 69-73; Appendix I) The legal misapprehension of the Court of Appeal as to the nature of incitement is dealt with, *infra,* at 11n.**

Petitioners' motion for rehearing to the Court of Appeal was denied on November 7, 1977 (Appendix B); their petition for a hearing to the California Supreme Court was denied on January 19, 1978, three justices voting to hear the matter (Appendix C). Petitioners urged in both courts, *inter alia*, that no actionable injuries could be proven since, given the complaint and the offer of proof, the First Amendment, as a matter of law, barred Plaintiff's purported causes of action.

### The Stay Applications

A petition for a stay of the mandate of the Court of Appeal was sought from that Court and denied by it on February 2, 1978. On that same date, a motion for a stay pursuant to 28 U.S.C. § 2101(f) (1970) was made to Mr. Justice Rehnquist. In his Chambers Opinion of February 10, 1978, Justice Rehnquist stated he was

> "quite prepared to assume that [this] Court would find the decision of the Court of Appeal sought to be stayed a 'final judgment' for purposes of 28 U.S.C. § 1257(2) pursuant to its holding in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). But the mere fact that the Court would have jurisdiction to grant a stay does not dispose of all the prudential considerations which, to my mind, militate against the grant of the application in this case." (46 U.S.L.W. at 3523)

Based on such "prudential considerations", the stay was denied. The matter has been remanded to the Superior Court in San Francisco where a trial date has not yet been set.



## REASONS FOR GRANTING THE WRIT

### Introduction

This Petition presents the single question of whether the tort of "imitation" may, consistently with long-standing First Amendment principles, be permitted to survive. The tort theory urged upon the California courts in this case is as simplistic as it is novel, as insidious as it is unbounded. Those who create and exhibit dramatic works are, Plaintiff asserts, liable for injury caused by imitation of any aspect of the expression. Such liability extends to any individual injured by those who allegedly act in imitation of the expression, no matter how depraved the actor who actually causes the injury;* and the liability exists notwithstanding the absence of any intent to bring about such imitation or injury on the part of those upon whom such liability is to be imposed.

Such a theory—Plaintiff's only theory—would not simply chill free expression; it would, in the words of the trial judge who rejected it as unconstitutional, "freeze the creative arts." (CT 185; 12a) Yet the California Court of Appeal has ordered a trial to be held based on just that theory.

Whatever the result of such a trial, the potential inhibiting effect of the continued viability of the tort itself can hardly be overstated. If Petitioners prevail at trial on one of a number of their factual defenses—*e.g.*, that the assailants of the Plaintiff did not even view the program—the tort fashioned in the case would still survive. And, of course, if Petitioners should fail to prevail at trial, the

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* In the present case, Plaintiff has asserted that at least one of the girls who allegedly committed the assault involved in the case "had a disturbed mind" and a criminal record. (RT 48)

months or years that would ensue during the process of appellate review could not help but chill the range and variety of the entirety of the creative arts.

What must, we submit, be determined is whether the tort of imitation is to be permitted to survive. We believe it may not and that it is essential that such a ruling be made now.

## I.

### Creation of Potential Tort Liability Predicated on the Possibility of Imitation by Viewers of Telecast Dramas Would Imperil the Vigor of Artistic and Journalistic Efforts and Violate the First Amendment.

#### A. *Expression That Would Be Punished by the Imposition of Liability for the Tort of Imitation Is Fully Protected by the First Amendment.*

The First Amendment reflects a fundamental judgment of our nation's founders, confirmed by experience through the years, that except with respect to "certain well-defined and narrowly limited classes of speech,"* society's best interests dictate that free expression not be limited by punishment or sanction, whether by governmental authorities or by private citizens acting under and through judicial or other governmental authority. This Court has thus characterized the "narrowly limited classes of speech" which fall beyond the protection of the First Amendment as encompassing the "lewd and obscene, the profane, the libelous and the insulting or 'fighting' words. . . ." (*Chaplinsky* v. *New Hampshire, supra,* 315 U.S. at 572)

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* *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 571 (1942); *see also Cohen* v. *California,* 403 U.S. 15, 19-20 (1971).



The complaint in this action does not allege that "Born Innocent" fits into any of these categories;* it does not even refer or allude to the concepts. Similarly, neither the complaint nor even the offer of proof proffered by Plaintiff prior to the trial court's rendering of judgment (Appendix I), asserts facts which could satisfy this Court's test for incitement set forth in *Brandenburg* v. *Ohio,* 395 U.S. 444, 447-48 (1969).** The novel tort asserted here is

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* Of course, the fact that "Born Innocent" was a drama presented on television—a visual and aural medium—in no way detracts from the First Amendment protection afforded the presentation. *See Rosenbloom* v. *Metromedia Inc.,* 403 U.S. 29 (1971); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94 (1973).

Dramatic expression and dramatic presentations have long been held protected by the First Amendment. *See, e.g., Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546 (1975); *Miller* v. *California,* 413 U.S. 15 (1973); *Kingsley International Pictures Corp.* v. *Regents of the University,* 360 U.S. 684 (1959).

** In *Brandenburg,* this Court found unconstitutional a conviction based on the Ohio Criminal Syndicalism statute. The Court held that:

> "[T]he constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where *such advocacy* is *directed* to inciting or producing imminent lawless action and is likely to incite or produce such action." (395 U.S. at 477) (emphasis added). *See also Hess* v. *Indiana,* 414 U.S. 105 (1973).

In this case, neither the complaint nor the offer of proof even suggested that the drama advocated anything, let alone that it was directed to inciting any particular conduct. The complaint simply asserted the foreseeability of imitation. Thus, as a matter of law, the complaint—even as supplemented by the offer of proof—is inadequate to state a claim as to incitement or to raise any factual issue as to the matter.

The Court of Appeal, which held such a factual issue to have been raised, may have done so because it erroneously understood that it was necessary for defendants to show that the program did not "advocate or *encourage* violent or depraved acts" in order for defendants to prevail as a matter of law. (5a) The "encourage" standard is in flat conflict with *Brandenburg.* The significance of this erroneous understanding of the rule is reflected in the Court

one based *entirely* on the prospect of imitation on the part of an immense unknown and unseen audience.

This Court has consistently held that, absent "fighting words" not involved here, free expression may not be restricted simply because of a possible reaction on the part of even a finite audience, physically confronted by the speaker. Thus, in *Cohen* v. *California*, 403 U.S. 15 (1971), the Court was asked to sustain a California breach of the peace conviction based on the danger perceived by the California Court of Appeal that defendant's display on his jacket of certain offensive words made it "reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant. . . ." (*Id.* at 17) Mr. Justice Harlan, writing for the Court, made clear that this reliance by the Court of Appeal on

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of Appeal's conclusion that the trial court found that the film did not "encourage violent or depraved acts" and that this was the basis of its decision. (2a) A conclusion as to whether or not a film "encourage[d]" particular actions may or may not be a matter of fact, as the Court of Appeal concluded, but it was utterly irrelevant to the issue before the trial court or the Court of Appeal. The trial court did not apply this erroneous standard; on the contrary, it correctly applied the *Brandenburg* test and held that "Born Innocent":

> "is not, in whole or in part, directed to inciting or producing imminent lawless action." (CT 186a; 16a)

Given the pleadings and offer of proof, this was entirely proper, even had the Court not viewed the film. Having viewed it, the Court properly determined that no issue of fact could exist as to intent to advocate and that it could not permit this issue to go to a jury. This was properly a threshold issue of law "for the trial judge in the first instance." *Rosenblatt* v. *Baer*, 383 U.S. 75, 88 (1966); *and see id.* at n.15; *cf. Wasserman* v. *Time, Inc.*, 424 F.2d 920, 922 (D.C. Cir.) (Wright, J., concurring), *cert. denied*, 398 U.S. 940 (1970). The trial court so held in its third conclusion of law quoted above. That the trial court also characterized the conclusion as a matter of "constitutional fact" (CT 183; 10a) and a "finding of fact" (CT 186a; 16a), of course, in no way alters the fundamental nature of the determination.



the foreseeability of a criminal response by some individuals was "untenable." (*Id.* at 23)

> *"There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression.* The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves. Cf. *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966); *Cox* v. *Louisiana*, 379 U.S. 536, 550-51 (1965)." (403 U.S. at 23) (emphasis added)

Precisely the same may be said of this case.

### B. *The Undefined and Sweeping Reach of the Tort of Imitation Threatens the Vigor of All Journalistic and Creative Endeavors.*

The dramatic presentation in question in this case involved a fictional portrayal of an unpleasant, but very real world. It is a reality that attacks of this kind dealt with in the film do occur. If a plaintiff can compel a broadcaster (or a playwright or a publisher) to defend himself before a jury on a claim that some depraved individual imitated events in a drama delving into the darker side of life,* telecasting serious drama and art surely becomes far less attractive to those contemplating its potential costs. If

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* From the Greek tragedians through Shakespeare, Dostoevski, Genet, and still more modern authors, many writers have concluded that by depicting violence and affliction, they can most effectively explore the nature and limits of man's humanity.

fiction based on reality may, if allegedly imitated, provide a basis for liability, it can be argued that there is little to prevent the courts from basing liability on imitation of reality itself: on imitation of events depicted as part of media coverage of the news. Are there to be jury trials with respect to imitations alleged to follow the telecasts of reports of a series of assassinations? Is a station which broadcasts an account of a crime or civil unrest to be liable if imitation occurs? Surely censorship achieved through such indirect means would be at least as pernicious as the direct restraints held unacceptable by this Court.* *Cf. Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976).

This Court has recognized the serious danger of chilling expression inherent in imposing tort liability with respect to speech or press activities. It has, in a series of decisions over the last fifteen years, limited liability even with respect to such well-established torts as libel. *See, e.g., New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). The danger impelling such rulings is the fear that law—whether statutory or case law—fashioned without taking account of the First Amendment "dampens the vigor and limits the variety of public debate." (376 U.S. at 279)

As Mr. Justice Frankfurter stated in *Kingsley International Pictures Corp.* v. *Regents of the University*, 360 U.S. 684 (1959):

* The significance attached to this case by creative artists, NBC's broadcast competitors, and scholars is reflected in the unusual number of *amicus curiae* briefs filed in the California courts by, *inter alia*, The Writers Guild, The Motion Picture Association of America, The California Broadcasters Association, CBS Inc., American Broadcasting Companies, Inc. and the American Library Association, each commenting extensively on the inhibiting effect of a decision according any credence to a rule of law such as that sought by Plaintiff. A number of entities and individuals filed *amicus curiae* briefs on behalf of Plaintiff as well.



> "The ultimate reason for invalidating such laws is that they lead to timidity and inertia and thereby discourage the boldness of expression indispensable for a progressive society." (Franfurter, J., concurring) (*Id.* at 695)

Here, if anything, the potential for inhibition is far greater than in libel or even obscenity cases. A tort based on imitation is so vague as to defy rational prediction as to what may or may not lead to liability. This would itself have provided a basis for sustaining the trial court's rejection of such a tort on First Amendment grounds.* It provides ample basis for plenary review by this Court.

## II.

### The Decision of the Court of Appeal Is a Final Judgment and in All Respects Ripe for Review.

The Court of Appeal decision is a final judgment for purposes of 28 U.S.C. § 1257. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). Mr. Justice Rehnquist recognized this fact, even as he denied the requested stay in this matter on prudential grounds.

> "I am quite prepared to assume that the Court would find the decision of the Court of Appeal sought to be stayed a 'final judgment' for purposes of 28 U.S.C. § 1257(2) pursuant to its holding in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)." (46 U.S.L.W. at 3523)

The test set forth in *Cox Broadcasting* is a "pragmatic" one and in applying it this Court "looks to the whole

* *See Winters* v. *New York*, 333 U.S. 507 (1948); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 217-18 (1975); *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966).

record" in assessing finality. *Local 438, Construction Laborers* v. *Curry,* 371 U.S. 542, 551 (1963).

In *Cox Broadcasting* this Court recognized that where, as here, a final determination of a federal question had been made by the state court, but further proceedings in the state court might "obviate later review of the federal issue," (420 U.S. at 486 n.13) review is appropriate

> "if a refusal immediately to review the state-court decision might seriously erode federal policy. . . ." (420 U.S. at 483)

In *Cox,* as here, the federal policy threatened by the state court determination was that of freedom of expression. There, as here, state appellate review of federal questions in a novel tort action had led to a remand for a state trial despite objections that the claim was barred by the First Amendment. There, as here, there were non-federal grounds upon which the defendant could have prevailed at trial.* Nonetheless the court in *Cox* held the decision to be final and ripe for review, stating:

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* In this case, for example, Petitioners could well prevail on the basis that Plaintiff's assailants had not even watched the program; that the assailants were aberrational members of society, one with a criminal record; and the like. But if Petitioners were to prevail on such grounds, the tort fashioned in this case would still survive the case—precisely what this Court in *Cox* sought to avoid. As the Court held in *Cox:*

> "That the petitioner who protests against the state court's decision on the federal question might prevail on the merits on nonfederal grounds in the course of further proceedings anticipated in the state court and hence obviate later review of the federal issue here is not preclusive of our jurisdiction. *Curry, Langdeau, North Dakota State Board of Pharmacy, California* v. *Stewart,* 384 U.S. 436 (1966) (decided with *Miranda* v. *Arizona*), and *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), make this clear. In those cases, the federal



> "[Defendants] may prevail at trial on nonfederal grounds, it is true, but if the Georgia court erroneously upheld the statute, there should be no trial at all. Moreover, even if appellants prevailed at trial and made unnecessary further consideration of the constitutional question, there would remain in effect the unreviewed decision of the State Supreme Court that a civil action for publishing the name of a rape victim disclosed in a public judicial proceeding may go forward despite the First and Fourteenth Amendments. Delaying final decision of the First Amendment claim until after trial will 'leave unanswered . . . an important question of freedom of the press under the First Amendment,' 'an uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press.' *Tornillo, supra,* at 247 n.6. On the other hand, if we now hold that the First and Fourteenth Amendments bar civil liability for broadcasting the victim's name, this litigation ends. Given these factors—that the litigation could be terminated by our decision on the merits and that *a failure to decide the question now will leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt*—we find that reaching the merits is consistent with the pragmatic approach that we have followed in the past in determining finality. *See Gillespie* v. *United States Steel Corp.,* 379 U.S. 148 (1964); *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. at 124; *Mills* v. *Alabama,* 384 U.S., at 221-222 (Douglas, J., concurring)." (420 U.S. at 485-87) (footnotes omitted) (emphasis added)

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issue having been decided, arguably wrongly, and being determinative of the litigation if decided the other way, the finality rule was satisfied." (420 U.S. at 486 n.13)

Precisely the same factors militate in favor of finality here. The California Court of Appeal has reversed the trial court's decision that the First Amendment bars the purported cause of action as a matter of law; it has held instead that issues of fact requiring a jury trial exist and has done so based, in part, on a misapprehension of this Court's decision in *Brandenburg* v. *Ohio, supra.** Its decision, of which review was denied by the California Supreme Court, suggests to would-be plaintiffs and defendants alike that the burdens and expense of a jury trial may be imposed on the media and others under the imitation theory. The chilling effect of just such a prospect—its invitation to timidity and excess caution—is already real. As in *Cox Broadcasting*, the press (and other authors and dramatists) are already "operating in the shadow of the civil . . . sanctions of a rule of law . . . the constitutionality of which is in serious doubt." *Cox Broadcasting* v. *Cohn, supra*, 420 U.S. at 486. The decision of the Court of Appeal rejecting the trial court's dismissal of this action on First Amendment grounds is final and the Court has jurisdiction to review it.

In denying Petitioners' application for a stay in this matter, Mr. Justice Rehnquist concluded that certain "pru-

* The Court of Appeal did hold open the possibility that subsequent factual review, presumably informed by First Amendment standards, could lead to reversal of a verdict for Plaintiff-Respondent. This prospect, necessarily premised on a view that the claim is not barred as a matter of law, does not affect this Court's jurisdiction. While *Cox* speaks of nonfederal grounds remaining to be tried, the presence of federal grounds other than those finally decided by the state court should not preclude a finding of finality where, as here, the mere pendency of a constitutionally suspect claim invites self-censorship. In fact, a reversal of a jury verdict based on an evidentiary review would itself pose a serious threat of self-censorship, for it would implicitly sanction the tort of imitation in some circumstances, while simultaneously thwarting review of just that premise. Only review by this Court at the present stage can avoid that danger.



dential considerations . . . militate against the grant of [such] application." (46 U.S.L.W. at 3523) Assuming that these considerations may be thought to apply with equal force in considering a petition for certiorari as on an application for a stay, Petitioners submit that, on balance, the prudential concerns involved here militate strongly in favor of the granting of a writ of certiorari.

Mr. Justice Rehnquist stressed his view that an insufficient showing of "irreparable injury" had been made in this case. (*Id.* at 3524) In *Cox Broadcasting* v. *Cohn* and *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) this Court held that the chilling effect resulting from State decisions refusing to invalidate restrictions on a range of expression limited in scope if great in significance, was so unacceptable as to warrant immediate review. The threat of inhibition here is far greater, for the tort here sweeps across all forms of expression; any work may be imitated in a fashion subjecting those associated with it to potential liability—or at least to trial—at the behest of any of an enormous reservoir of potential plaintiffs.

Mr. Justice Rehnquist has suggested that the Court of Appeal decision lacks precision and that this militates against review. (*Id.* at 3523) In many respects, the decision, like the tort it considers, is vague; this heightens the threat to protected interests, however, and militates in favor of review. The crucial aspects of the decision are, in any event, clear. The Court reversed the trial court's conclusion that the action was barred as a matter of federal constitutional law; it found issues of fact to be tried with respect to a theory of incitement, in part, by employing a standard unacceptable under this Court's decision in *Brandenburg*; and in making these rulings the Court accepted the premise that Plaintiff could conceivably introduce "evidence" which might demonstrate "actionable

injuries" "despite First Amendment protections." (141 Cal.Rptr. at 514; 6a) Each of these aspects is clear and, we submit, dangerously wrong.

Although Mr. Justice Rehnquist has suggested that the decision "might have been based on a state procedural ground," (46 U.S.L.W. at 3523) Petitioners submit that the decision was not so based and that, even if it had been, such procedural basis would be so insubstantial and so intermingled with the federal policy it compromised, that it could not constitute an independent state ground for decision.

The issue of whether a tort of the general kind alleged here may ever reach the jury is surely a federal question. *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964). The distinct question of whether the tort alleged here raised a question of fact* which could go to the jury is wholly intermingled with federal substantive law. *See Greenbelt Cooperative Publishing Ass'n* v. *Bresler,* 398 U.S. 6, 13 (1970); *Time, Inc.* v. *Pape,* 401 U.S. 279, 290 (1971); *Beckey Newspapers* v. *Hanks,* 389 U.S. 81, 85 (1967) *(per curiam); cf. Fiske* v. *Kansas,* 274 U.S. 380 (1927).

Nor may the decision of the Court of Appeal properly be characterized as resting on any independent and adequate state ground relating to the propriety of the trial judge viewing the film before rendering his decision. For one thing, the trial judge explicitly held that taking the allegations of Plaintiff's complaint and offer of proof as true, "the law provides no remedy" and the "plaintiff's

* The only fact question specifically suggested by the Court of Appeal concerned whether or not the film in question could constitute incitement. Whether such question is one of fact or rather a threshold issue of constitutional law (*see Rosenblatt* v. *Baer, supra,* 383 U.S. at 88 and n.15); *cf. Wasserman* v. *Time, Inc., supra* (Wright J., concurring)) is itself a federal question and intermingled with the basic issue on this Petition.



alleged causes of action . . . are barred by the First Amendment. . . ." (CT 186a; 16a) These legal conclusions of the trial court mandated dismissal in themselves whether or not the film was viewed, and were entirely appropriate in connection with the judgment rendered by the trial court.*

In any event, to attribute to the Court of Appeal the view that the trial judge might not properly see the film on a motion for judgment on the legal issue, while (as the Court itself recognized) it might do so on a motion for summary judgment would be to attribute a triviality to the appellate decision inconsistent with its own acknowledgment of the important constitutional protections involved.** Such a holding simply could not, under any circumstance, provide an adequate state ground for decision. *Staub* v. *City of Baxley,* 355 U.S. 313, 318-20 (1958); *Davis* v. *Wechsler,* 263 U.S. 22, 24-25 (1923). Indeed, if the Court of Appeal did allow so trivial an issue to dictate that Petitioners submit to the rigors of a trial with the attendant

* Under California law, judgment on the pleadings may be granted at or before trial whether or not a prior challenge to the complaint's legal sufficiency has been denied. 4 Witkins California Procedure § 161, at 2816-17 (2d ed. 1971). This provision was cited by the trial court. (11a) Such findings were also appropriate under sections 591 and 592 of the California Code of Civil Procedure (West 1976) which mandate that issues of law be tried by the court (§ 591) and that where "there are issues both of law and fact," the issue of law must first be disposed of (§ 592).

** This reading was suggested by the Plaintiff-Respondent to the California Supreme Court. The Court of Appeal itself recognized, however, that the issue of incitement might have been determined "from viewing [the film] in connection with a motion for summary judgment." (5a) Under settled California law, a summary judgment motion may be renewed. *Schulze* v. *Schulze,* 121 Cal.App.2d 75, 262 P.2d 646 (1953); 4 Witkins California Procedure § 195, at 2842 (2d ed. 1971). It would thus be totally unreasonable—and unfair—to attribute to the Court of Appeal the conclusion that the trial court, while entitled to rule on the film as a matter of law on such a motion, lost the power to do so by otherwise characterizing the motion before it.

risk of inhibition of themselves and others, this would itself deprive Petitioners of their constitutional rights. *See Speiser* v. *Randall,* 357 U.S. 513, 520-21, 525-26 (1958); *cf. Rosenblatt* v. *Baer, supra,* 383 U.S. at 88 and n.15.*

The decision of the California Court of Appeal resurrects a lawsuit, the mere pendency of which poses substantial risks of inhibition across the entire spectrum of artistic and journalistic endeavor. Review and reversal by this Court is required to end the "uneasy and unsettled constitutional posture [which can] only further harm the operation of a free press." *Miami Herald* v. *Tornillo, supra,* 418 U.S. at 247 n.6.

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* It is precisely to avoid the inhibition created by the mere pendency of groundless lawsuits that summary procedures have become the " 'rule', and not the exception, in defamation cases," for example, *Guitar* v. *Westinghouse Electric Corp.,* 396 F.Supp. 1042, 1053 (S.D.N.Y. 1975), *aff'd mem.,* 538 F.2d 309 (2d Cir. 1976). *See also, Washington Post Co.* v. *Keogh,* 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 1011 (1967); *Time, Inc.* v. *McLaney,* 406 F.2d 565, 566 (5th Cir.), *cert. denied,* 395 U.S. 922 (1969).



## CONCLUSION

For the reasons set forth above, a writ of certiorari should be issued to review the judgment and opinion of the California Court of Appeal.

Dated: March 17, 1978

Respectfully submitted,

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# APPENDIX

## APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

1 Civil 40580 (Superior Court No. 681-053)

Filed—Oct. 26, 1977

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OLIVIA N., a minor,

*Plaintiff and Appellant,*

vs.

NATIONAL BROADCASTING CO., INC., et al.,

*Defendants and Respondents.*

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Olivia N. appeals from a judgment of dismissal which the court rendered before the commencement of a scheduled jury trial in her action against respondents National Broadcasting Co., Inc. and the Chronicle Broadcasting Company.

Appellant's complaint sought damages from respondents for injuries allegedly inflicted upon her by certain juveniles who were acting upon the stimulus of observing a scene of brutality which had been broadcast in a television drama entitled "Born Innocent." The subject matter of the television film was the harmful effect of a state-run home upon an adolescent girl who had become a ward of the state. In one scene of the film, the young girl enters the community bathroom of the facility to take a shower. She is then shown taking off her clothes and stepping into the shower, where she bathes for a few moments. Suddenly, the water stops and a look of fear comes across her face.

*Appendix A*

Four adolescent girls are standing across from her in the shower room. One of the girls is carrying a "plumber's helper," waving it suggestively by her side. The four girls violently attack the younger girl, wrestling her to the floor. The young girl is shown naked from the waist up, struggling as the older girls force her legs apart. Then, the television film shows the girl with the plumber's helper making intense thrusting motions with the handle of the plunger until one of the four says, "That's enough." The young girl is left sobbing and naked on the floor.

It is alleged that appellant, aged nine, was attacked by minors at a beach in San Francisco. It is alleged that the minors attacked appellant and another minor girl, and forcibly and against her will, "artifically raped" appellant with a bottle. The complaint alleges that the assailants had seen the "artificial rape" scene in "Born Innocent" and that the scene "caused them to decide to do a similar act to a minor girl."

When the case came on for jury trial, respondents moved, before impanelment of a jury, that the court first determine for itself the "constitutional fact" of "incitement"—i.e., whether the film, "Born Innocent," was a vehicle for "inciting" violent and depraved conduct such as the crimes of the juveniles in the present case, of which appellant was the victim.

The trial judge viewed the entire film, made a finding that it did not advocate or encourage violent and depraved acts and thus did not constitute an "incitement," and rendered judgment for respondents without impaneling a jury. The present appeal followed.

Analysis of this appeal commences with recognition of the overriding constitutional principle that material communicated by the public media, including fictional material



*Appendix A*

such as the television drama here at issue, is generally to be accorded protection under the First Amendment to the Constitution of the United States. (*Joseph Burstyn, Inc.* v. *Wilson* (1952) 343 U.S. 495, 501; *Winters* v. *New York* (1948) 333 U.S. 507, 510.) In *Joseph Burstyn, Inc.* v. *Wilson, supra,* at p. 501, the court stated:

> It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. As was said in *Winters* v. *New York,* 333 U.S. 507, 510 (1948):
>
> "The line between the informing and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."

(Fn. omitted; *see also Kingsley Pictures Corp.* v. *Regents* (1959) 360 U.S. 684, 690.) "There is no doubt that entertainment, as news, enjoys First Amendment protection." (*Zacchini* v. *Scripps-Howard Broadcasting Co.* (June 28, 1977) 45 L.W. 4954, 4958.) As the court stated in *Rosenbloom* v. *Metromedia* (1971) 403 U.S. 29, 41:

> "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs." *Time, Inc.* v. *Hill,* 385 U.S. 374, 388 (1967).

> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama,* 310 U.S. 88, 102 (1940).

Specifically, television broadcasting is a medium which is entitled to First Amendment protection. (See *Red Lion Broadcasting Co.* v. *FCC.* (1969) 395 U.S. 367, 386; *Writers Guild of America, West, Inc.* v. *F.C.C.* (C.D.Cal. 1976) 423 F.Supp. 1064, 1147.) Thus, expression by means of television dramatization is included within the free speech and free press guarantees of the First and Fourteenth Amendments. Where a television broadcast does not involve unprotected speech, the constitutional protection for free speech limits the state's power to award damages in a negligence action based upon the broadcast. (See *New York Times Co.* v. *Sullivan* (1964) 376 U.S. 254, 265, 277-278.)

The freedom of speech guaranteed by the First Amendment is not, of course, absolute. Certain narrowly limited classes of speech may be prevented or punished by the state consistent with the principles of the First Amendment. Speech which is obscene is not protected by the First Amendment. (*Miller* v. *California* (1973) 413 U.S. 15, 23, 34-35, reh. den. 414 U.S. 881.) "Born Innocent" is not constitutionally obscene. "[L]ibel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like" are also outside the scope of constitutional protection. (*Konigsberg* v. *State Bar* (1961) 366 U.S. 36, 49, fn.10.) Generally, libel and slander are considered outside the





scope of First Amendment protection because "there is no constitutional value in *false* statements of *fact.*" (*Gertz* v. *Robert Welch, Inc.* (1974) 418 U.S. 323, 340; emphasis added.) However, the free speech guarantee even requires that some protection be given to falsehood, in certain circumstances, "in order to protect speech that matters." (*Gertz* v. *Robert Welch, Inc., supra,* at p. 341.) The constitutional freedom for speech and press also does not immunize "speech or writing used as an integral part of conduct in violation of a valid criminal statute." (*Giboney* v. *Empire Storage Co.* (1949) 336 U.S. 490, 498.) Additionally, speech which is directed to inciting or producing imminent lawless action, and which is likely to incite or produce such action, is also outside the scope of First Amendment protection. (See *Brandenburg* v. *Ohio* (1969) 395 U.S. 444, 447-448.)

The question whether the television film "Born Innocent" falls within any category of unprotected speech may, where the facts are not disputed, constitute a question of law. (*L.A. Teachers Union* v. *L.A. City Bd. of Ed.* (1969) 71 Cal.2d 551, 556; *Johnson* v. *County of Santa Clara* (1973) 31 Cal.App.3d 26, 32.) In the present case, the film itself was available and the court might perhaps have determined from viewing it in connection with a motion for summary judgment, that the film did not advocate or encourage violent and depraved acts and thus did not constitute an "incitement." (See *Paris Adult Theatre I* v. *Slaton* (1973) 413 U.S. 49, 56, reh. den. 414 U.S. 881; *Jenkins* v. *Georgia* (1974) 418 U.S. 153, 159-160, 161; *Chaplinsky* v. *New Hampshire* (1942) 315 U.S. 568, 574.) But a motion for summary judgment had earlier been

denied by another judge. No such motion was pending when the trial judge rendered the decision now under review.

Trial by jury had been demanded by appellant. That demand put into operation her right, under California Constitution, article I, section 7, to have all fact issues in the case determined by a jury. The trial court's action in viewing the film, and thereupon making fact findings and rendering judgment for respondents, was a violation of appellant's constitutional right to trial by jury. It was both reversible error and an act in excess of jurisdiction. (4 Witkin, Cal. Procedure (2d ed. 1971) Trial, § 73, p. 2908.)

Here, it is appropriate to acknowledge that, if the cause had proceeded properly to trial before a jury and a verdict awarding damages to appellant had been the result, it would have been the responsibility of the trial court, or perhaps of this court on appeal, to determine upon a re-evaluation of the evidence whether the jury's fact determination could be sustained against a First Amendment challenge to the jury's determination of a "constitutional fact." (*Rosenbloom* v. *Metromedia, supra,* 403 U.S. 29, 54.) But the case is not presently ripe for such a determination, appellant having been deprived of her constitutional right to present before a jury evidence which she contends will show that, despite First Amendment protections, the showing of the film, "Born Innocent," resulted in actionable injuries. (Cf. *Weirum* v. *RKO General, Inc.* (1975) 15 Cal.3d 40.)



The judgment is reversed with directions to impanel a jury and proceed to trial of the action.

CHRISTIAN
Christian, J.

We concur:

RATTIGAN
Rattigan, Acting P.J.*

EMERSON
Emerson, J.**

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* Under assignment by the Chairman of the Judicial Council.
** Retired judge of the superior court sitting under assignment

## APPENDIX B

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE FIRST APPELLATE DISTRICT
DIVISION FOUR
No. 40580
Filed—November 23, 1977

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OLIVIA NIEMI, etc.,
*Plaintiff and Appellant,*
vs.
NATIONAL BROADCASTING COMPANY, INC., ET AL.,
*Defendants and Respondents.*

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BY THE COURT:

The petition for rehearing filed in the above entitled cause is hereby denied.

Dated: November 23, 1977

CHRISTIAN, J.,
*Acting P.J.*



## APPENDIX C

ORDER DUE
January 24, 1978

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL
1st District, Division 4, Civil No. 40380
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

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OLIVIA N., a minor,
v.
NATIONAL BROADCASTING COMPANY, INC. ET AL.

---

Respondents' petition for hearing denied.

Tobriner, J., Richardson, J., and Manuel, J., are of the opinion that the petition should be granted.

Filed: January 19, 1978

/s/ BIRD,
*Chief Justice*

## APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

No. 681 053

Filed—September 20, 1976

---

OLIVIA NIEMI, a minor, by and through her Guardian ad Litem, VALERIA POPE NIEMI,

*Plaintiff,*

vs.

NATIONAL BROADCASTING COMPANY, INC., and CHRONICLE BROADCASTING COMPANY,

*Defendants.*

---

MEMORANDUM OF INTENDED DECISION

The motion picture and television screen play entitled "BORN INNOCENT" broadcast by the defendant television station at 8:00 p.m. on the evening of September 10, 1974, totalling two hours in length was viewed by the Court for two reasons:

Firstly, to determine at a time convenient to Court and counsel whether or not the film in part or in its entirety would be allowed into evidence and viewed by a jury;

Secondly, the film was viewed by the Court for the purpose of finding the Constitutional fact necessarily involved in the question of whether it was protected by the First Amendment of the United States Constitution and Section



*Appendix D*

9, Article I of the Constitution of the State of California as asserted by defendant.

The Court viewed the film with the agreement of counsel in order to make possible both determinations.

It is the opinion of the Court that the television screen play entitled "BORN INNOCENT" is fully protected by the First Amendment of the Constitution of the United States of America and by Section 9 Article I of the Constitution of the State of California.

In arriving at this decision the Court took into account the offer of proof by counsel for the plaintiff, and furthermore assumed the facts alleged in the complaint to be true.

The motion by counsel for the defense for judgment on the pleadings and the nonstatutory procedure set forth at *Volume 4* of *Witkin's California Procedure* at page 2816 is granted and judgment will be entered for the defendants.

Insofar as counsel for the plaintiff has requested findings of fact and conclusions of law, the Court directs counsel for the defendant to prepare the same. However, it should be understood that the premier fact found by this Court is that the film is Constitutionally protected, and the conclusion of law is based not only upon that preliminary and premier Constitutional fact, but based upon all of the facts set forth in the pleadings by the plaintiff and his offer of proof.

The Court also grants the motion to exclude the film from evidence, and without the film, plaintiff has no cause of action against the defendant. That being the case, there was and is no profit to the plaintiff to proceed by the more usual procedure of waiting until a jury is selected and granting a nonsuit after plaintiff's opening statement, it being the plaintiff's position that everything that could be said on behalf of his case was said during the two days of

*Appendix D*

discussion and oral and written argument. Furthermore, even less profit would flow to the orderly administration of justice and the position of the plaintiff if a nonsuit were to be granted at the conclusion of his case.

In effect, the Court's ruling on the pleadings and in ruling in advance on the evidence is comparable in practice and in theory to Penal Code Section 1538.5, which has been so successfully used in the criminal law to suppress evidence that is Constitutionally inadmissible.

The Court is of the opinion that *Weirum* v. *RKO General Inc.*, 15 Cal. 3d 40 (1975) is not applicable.

The State of California is not about to begin using negligence as a vehicle to freeze the creative arts.

Dated: September 17, 1976.

/s/ JOHN A. ERTOLA
*Judge of the Superior Court*



## APPENDIX E

[Name and address of attorneys for defendants omitted]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO
No. 681-053
Filed—September 29, 1976

---

OLIVIA NIEMI, a Minor, by and through her Guardian ad Litem, VALERIA POPE NIEMI,
*Plaintiff,*

vs.

NATIONAL BROADCASTING CO., INC.,
CHRONICLE BROADCASTING CO.,
*Defendants.*

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JUDGMENT

This cause having duly come on for trial before the undersigned September 13, 1976, Lewis, Rouda & Lewis by Marvin E. Lewis appearing for plaintiff and Lillick McHose & Charles by Anthony Liebig and Andrew W. Robertson and Brobeck, Phleger & Harrison by Richard Haas appearing for defendants, and defendants having moved for judgment on the legal issue, the Court having viewed the motion picture "Born Innocent," the matter having been argued and submitted, and the Court having issued its Memorandum of Intended Decision and Findings of Fact and Conclusions of Law, and good cause appearing therefor:

*Appendix E*

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants have judgment against plaintiff, together with their costs of suit in the sum of $ NONE.

Dated: September 28th, 1976

/s/ JOHN A. ERTOLA
*Judge*



## APPENDIX F

[Name and address of attorneys for defendants omitted]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO
No. 681-053
Filed—September 29, 1976

---

OLIVIA NIEMI, a Minor, by and through
her Guardian ad Litem, VALERIA POPE NIEMI,
*Plaintiff,*

vs.

NATIONAL BROADCASTING CO., INC.,
CHRONICLE BROADCASTING CO.,
*Defendants.*

---

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having duly come on for trial before the undersigned September 13, 1976, Lewis, Rouda & Lewis by Marvin E. Lewis appearing for plaintiff and Lillick McHose & Charles by Anthony Liebig and Andrew W. Robertson and Brobeck, Phleger & Harrison by Richard Haas appearing for defendants, and defendants having moved the Court for judgment on the issue of law, and the Court having viewed the motion picture "Born Innocent" and issued its Memorandum of Intended Decision herein, and good cause appearing therefor, the Court makes the following:

*Appendix F*

FINDING OF FACT

1. Said motion picture is not, in whole or in part, directed to inciting or producing imminent lawless action.

CONCLUSIONS OF LAW

1. Assuming plaintiff's assailants obtained the idea of assaulting her as a result of the telecast of said motion picture, and assuming the other facts alleged in the Complaint and offered to be proved by plaintiff to be true, the law provides no remedy.

2. Plaintiff's alleged causes of action, and each of them, are barred by the First Amendment to the United States Constitution and Article I, Section 2, of the California Constitution.

3. Said motion picture is not, in whole or in part, directed to inciting or producing imminent lawless action.

Dated: September 28th, 1976

/s/ JOHN A. ERTOLA
*Judge*



**APPENDIX G**

[Name and address of attorneys for plaintiff omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO
No. 681-053
Filed—October 9, 1974

---

OLIVIA NIEMI, a Minor, by and through her Guardian ad Litem, VALERIA POPE NIEMI,

*Plaintiff,*

vs.

NATIONAL BROADCASTING CO., INC., CHRONICLE BROADCASTING CO., and DOE I through DOE X, inclusive,

*Defendants.*

---

COMPLAINT FOR PERSONAL INJURIES

COMES NOW PLAINTIFF OLIVIA NIEMI, a Minor, by and through her Guardian ad Litem, VALERIA POPE NIEMI, and for a cause of action against defendants, and each of them, alleges as follows:

FIRST CAUSE OF ACTION

I

The true names and capacities, whether individual, corporate, associate, or otherwise, of defendants named herein as DOE I through DOE X, inclusive, are unknown to

plaintiff, who therefore sues said defendants by such fictitious names, and plaintiff will amend this complaint to show their true names and capacities when the same have been ascertained.

II

Defendants, DOE I to DOE X, inclusive, are and were at all times herein mentioned, corporations, partnerships, individuals, or unincorporated associations who were sponsors for "Born Innocent".

III

Defendants, DOE I to DOE X, inclusive, previewed said program and with knowledge of its contents, purchased advertising time from defendant NATIONAL BROADCASTING COMPANY, INC. or defendant CHRONICLE BROADCASTING COMPANY, and sponsored the broadcast of said program. By so doing defendants, DOE I to DOE X, inclusive, aided and abetted defendant NATIONAL BROADCASTING COMPANY, INC. and defendant CHRONICLE BROADCASTING COMPANY in broadcasting said program to the general public.

IV

Defendants, DOE I to DOE X, inclusive, after previewing said program and with knowledge of its contents, continued to sponsor or become sponsors for said program even though other potential advertisers withdrew their sponsorship after previewing said program and viewing said scene.

V

Defendant NATIONAL BROADCASTING COMPANY, INC. is and was at all times herein mentioned a duly licensed corporation authorized to do business, and was doing business at all times herein mentioned, in the County of San Francisco, State of California.



VI

Defendant NATIONAL BROADCASTING COMPANY, INC. is and was at all times herein mentioned in the business of producing, directing and broadcasting shows to the general public.

VII

Defendant CHRONICLE BROADCASTING COMPANY is and was at all times herein mentioned a duly licensed corporation authorized to do business, and was doing business at all times herein mentioned, in the County of San Francisco, State of California.

VIII

Defendant CHRONICLE BROADCASTING COMPANY, also known as KRON, is and was at all times herein mentioned in the business of producing, directing and broadcasting shows to the general public.

IX

At all times herein mentioned, defendants, and each of them, were the agents, servants and employees of all other defendants, and were acting within the course and scope of their agency, service and employment.

*Appendix G*

X

On or about September 10, 1974, defendant NATIONAL BROADCASTING COMPANY, INC., and defendant CHRONICLE BROADCASTING COMPANY, also known as KRON, broadcast a program for television entitled "Born Innocent", starring Linda Blair. Said program was shown to the public in the San Francisco Bay Area and nationally.

XI

Defendants, and each of them, advertised said program and invited the public to watch it.

XII

Said program was televised during "prime time", to wit: at 8:00 P.M.

XIII

Said program included a scene in which a minor female was cornered in a shower room by inmates of a reform school and a foreign object was shoved between her legs and into her vagina.

XIV

At said time and place, defendants, and each of them, negligently, carelessly and recklessly allowed said program to be televised to be viewed by whomever tuned in, including minors.



*Appendix G*

XV

Defendants, and each of them, knew or should have known that the idea of holding down a young girl and shoving a foreign object into her vagina was a perverted one, and defendants, and each of them, knew or should have known that the minds of minors are impressionable and that broadcasting such a scene could cause some minors to imitate such conduct. Further, defendants, and each of them, knew or should have known that minors would be apt to see the scene since the program was televised at 8:00 P.M. on "prime time".

XVI

That by reason of the negligent, wanton and careless acts of the defendants, and each of them, as hereinabove alleged, said minors did watch said scene and it caused them to decide to do a similar act to a minor girl. That as a direct and proximate result of said negligent, wanton and careless acts hereinabove alleged, said minors attacked plaintiff OLIVIA NIEMI and another minor girl and forcibly and against their will shoved a Coca-Cola bottle into their vaginas. Said attack occurred on or about September 13, 1974, at Baker's Beach in the City and County of San Francisco, State of California.

XVII

That by reason of the premises, and as a direct and proximate result thereof, plaintiff has necessarily incurred reasonable expenses for medical and hospital attention, x-rays, and nursing care, in amounts presently unknown.

*Appendix G*

Plaintiff prays leave to amend this complaint to insert the true amounts when the same shall be ascertained.

XVIII

By reason of the premises, and as a direct and proximate result thereof, plaintiff has sustained the following injuries:

1. Injury to the nervous system;

2. Injury to the vagina;

3. Great pain, suffering and mental anguish;

4. Other injuries not presently diagnosed. Plaintiff prays leave to amend this complaint to insert the true nature of the same when they shall be ascertained.

Further, plaintiff is informed and believes, and thereon alleges, that said injuries are permanent in nature.

Wherefore, plaintiff has been generally damaged in the sum of One Million Dollars ($1,000,000.00).

Second Cause of Action

As and for a second further and separate cause of action, plaintiff Olivia Niemi, a Minor, by and through her Guardian ad Litem, alleges as follows:

I

Plaintiff incorporates by reference and alleges as though fully set forth herein, Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, and XIII of the First Cause of Action.



*Appendix G*

II

At all times herein mentioned, defendants, and each of them, had actual knowledge of the nature, extent and impact of the attack scene in "Born Innocent"; that defendants, and each of them, further knew that this scene might cause minors to imitate this act and injure a human being; that despite said knowledge, said defendants, and each of them, wilfully and intentionally televised said program; that in televising said program defendants, and each of them, acted maliciously and in reckless disregard of its possible results; that in televising said program defendants, and each of them, acted maliciously and in reckless disregard of plaintiff's welfare and only in concern of their own economic interests and placed their financial interests above those of the plaintiff.

III

That by reason of the malicious and wilful acts of the defendants, and each of them, as hereinabove alleged, said minors did watch said scene and it caused them to decide to do a similar act to a minor girl. That as a direct and proximate result of said malicious and wilful acts hereinabove alleged, said minors attacked Olivia Niemi and another minor girl and forcibly and against their will shoved a Coca-Cola bottle into their vaginas. Said attack occurred on or about September 13, 1974, at Baker's Beach in the City and County of San Francisco, State of California.

IV

That in doing the acts and things hereinabove referred to, defendants, and each of them, acted wilfully and mali-

ciously, and therefore, plaintiff seeks exemplary and punitive damages against said defendants, and each of them, in the sum of TEN MILLION DOLLARS ($10,000,000.00).

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. General damages in the sum of ONE MILLION DOLLARS ($1,000,000.00);

2. Punitive or exemplary damages in the sum of TEN MILLION DOLLARS ($10,000,000.00);

3. For all of plaintiff's items of special damages as may be ascertained;

4. For all of plaintiff's costs of suit;

5. For all such other and further relief as to the Court may seem just and proper.

DATED: October 8, 1974.

LEWIS AND ROUDA

By: /s/ MARVIN E. LEWIS
MARVIN E. LEWIS
*Attorneys for Plaintiff*



## APPENDIX H

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE FIRST APPELLATE DISTRICT

DIVISION THREE

No. 39713

Filed—August 31, 1976

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NATIONAL BROADCASTING COMPANY, INC.,
CHRONICLE BROADCASTING CO.,
*Petitioners,*

vs.

SUPERIOR COURT,
CITY AND COUNTY OF SAN FRANCISCO,
*Respondent,*

OLIVIA NIEMI, ETC.,
*Real Party in Interest.*

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BY THE COURT:

The decision relied upon by the trial court (Weirum v. RKO General, Inc., 15 Cal.3d 40) is of doubtful application to the facts here. But resort to the prerogative writs is not unrestricted (see, e.g., Babb v. Superior Court, 3 Cal.3d 841, 850-851; Oceanside Union H. S. Dist. v. Superior Court, 58 Cal.2d 180, 185, fn.4). Here, the time and burden of trial can be substantially reduced by resort to the provision for separate trial of the issue of liability (Code Civ. Proc., § 598). By such procedure, the film, which may be determinative of the question of incitement, would be in evidence.

*Appendix H*

Hence, although we do not reach the merits at this time, the petition for writ of prohibition/mandate is denied.

Dated: August 31, 1976

DRAPER P. J.



## APPENDIX I

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT No. 6

THE HONORABLE JOHN A. ERTOLA,

JUDGE

No. 681 053

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OLIVIA NIEMI, a minor, by and through her guardian ad litem, VALERIA POPE NIEMI,

*Plaintiff,*

vs.

NATIONAL BROADCASTING COMPANY, INC., and CHRONICLE BROADCASTING COMPANY,

*Defendants.*

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

September 13, 14, 1976

APPEARANCES:

For Plaintiff:

Messrs. LEWIS, ROUDA & LEWIS
By: MARVIN E. LEWIS, Esq.
MICHAEL MOORE, Esq.
Penthouse—American Savings Building
690 Market Street
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*Appendix I*

For Defendants:

Messrs. Lillick, McHose & Charles
By: Anthony Liebig, Esq.
Andrew W. Robertson, Esq.
611 West Sixth Street, 28th Floor
Los Angeles, California 90017

Messrs. Brobeck, Phleger & Harrison
By: Richard Haas, Esq.
111 Sutter Street
San Francisco, California.

[Afternoon Session—September 14, 1976;
RT 68, line 22—RT 73, line 23]

[Mr. Lewis, Plaintiff's Attorney]: "Now if our California Supreme Court didn't speak out clearly enough for our Court of Appeal, and if I don't read the English language in the Supreme Court case [*Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974)] which in unmistakable terms by unanimous opinion of our Supreme Court, they said exactly what that case says, that no one who is injured by another's wrong can waive the First Amendment. This was done again by our United States Supreme Court and it is only right, because how can someone, regardless of what the article may be, use that article as they will? Sometimes that article can be used harmlessly and another time it could be used horrendously.

The same article can be used purposely to injure the mind of an infant and mean nothing when used on the mind of an adult. But the finder of fact must determine that after listening to the experts and all of the circumstances of the case.



*Appendix I*

Now I am saying at this point I want to make an offer of proof in this case, which I have not done up to this point.

I say in my offer of proof in this case I will prove the following:

I will prove by evidence, direct and circumstantial, that the four children that were involved in inserting a beer bottle into the vagina of Olivia Neimi [sic] and forcing another little six-year old child at the same time to insert two of her fingers and play with herself in her vagina, one of them said that she was influenced to do this act by what the girls told her in high school after she had seen the program "Born Innocent."

We will prove by the mother that one of the girls in this act saw the beginning of the program—didn't know how much—and said that she told her daughter to leave the room after she saw a scene—she doesn't remember which—which she didn't think proper for her daughter to watch, from which a jury well could infer that this picture was seen.

We will further prove from a Park Federal Police Officer by the name of Ronald Dondy that when he arrested these girls immediately after this crime and the girl who inserted the foreign object up the vagina of one girl and forced the fingers of the other girl into her vagina she said, "I hope it doesn't happen to you what happened to the girl in that television picture."

We further offer to prove that the officer when he heard that came back the following day and spoke to the other girls and they said, Yes, we did see this picture and we did see this rape scene.

*Appendix I*

We will further offer to prove that the girl who inserted the beer bottle said she did it because she was influenced by this very picture of "Born Innocent."

We will prove that NBC for a long period of time, even though they hadn't name [sic] it as such, had what was called the Family Hour when they realized that a great percentage of their audience were young children, and we will also prove that there is a case that has just been concluded where NBC has been fighting for that very hour of 8:00 o'clock, they are no [sic] claiming no violence or sex should go on at that time because it should be called the Family Hour, because it could hurt children.

We will show that in the library of NBC prior to this time they had books and treatises on this very subject written by psychiatrists and psychologists who had made a study of the effect of violence and sex on TV on children of the age of the children that were involved in this case, and particularly on children of disturbed mind.

We will prove by a Doctor Wald who examined one of the girls that inserted the foreign object into the vagina that she was a disturbed girl and that she was the very type of girl who, having seen this picture, would be very apt and probably would attempt to imitate what was seen in that picture.

We will further prove from these experts that the rest of the picture would mean nothing, because the mere fact that we are not considering obscenity—that would have no bearing whatsoever and it would be the effect of that particular scene.

We will further prove that whatever happened later in that particular picture, whatever message might have been shown, would have been wasted, because the children would have been in bed.



*Appendix I*

We will further prove that that particular scene had no message or no need to be in the picture; that there was nobody punished for ever doing that particular scene.

We will show that the final end of that scene ended in violence where the superintendent of this school was knocked over the head, blood was shown gushing from her head and the girls who were the violent ones walked off defiant, and they were the ones that were in charge, so no message came even if the children had been awake.

We will prove that this is not only a question of experts testifying or circumstantial evidence, even though the crime is within four days of what actually happened, being a very bizarre type of crime of females on females with a foreign object.

We will prove from the girls themselves that this is what influenced them and that it doesn't have to be left to speculation or for anyone to look at this picture.

We will further prove from a Dr. Liebert who wrote the book, "The Early Window—Effects of Television on Children and Youth," and who has made a study of this very subject for years and has lectured in seminars which members of NBC have attended, and other broadcasters have been warning for years that the very thing that happened here would happen unless something was done before the FCC—there has been testimony on this—and that the president of NBC prior to the very time of this incident testified that he agreed that this hour of the night these scenes shouldn't be shown, and realized the danger that could happen with other youngsters imitating this type of violence.

He will also testify that a child seeing this picture would most probably have done exactly what happened here, and will testify that in his opinion the injury that was caused here to this child was a proximate result of the picture "Born Innocent" being shown when it was shown.

*Appendix I*

We will show by Dr. Richard Feinbloom, a psychologist from Massachusetts, one of the outstanding experts in the country on this subject the same exact testimony that will be given by Dr. Liebert.

Dr. Robert Wald will testify likewise—and he is the psychiatrist who examined both the Neimi [sic] girl and the girl, Sharon Smith, who was the attacker, and he likewise will testify that this injury to the Neimi [sic] girl, which is a very serious injury and which is probably going to affect her sex life in the future, was caused by this willful, reckless and negligent act on the part of NBC. This testimony also will be borne out by a Doctor Cyril Raymore who is a psychologist who likewise has treated Olivia Neimi [sic] after the affect [sic].

We will bring out from the testimony of the director of NBC here, the Chronicle Publishing Company, that hindsight shows they should never have put the program on at this time.

We will further show that the defendant was a member of a broadcasting association who, because when they received hundreds of thousands of letters all over the United States protesting this scene, made them show it again and practically delete the censorship picture and put the picture on between 11:00 and 12:00 at night rather than at the 8:00 o'clock slot, and admonished them for doing so.

We will further show that they ran a deceiving ad to attract children, specifically where they said it was a child star that was going to star at the age of 15, and the ad that they had was placed on the same page of TV Guide the day before that they were showing a child show called "Born Free," and one of the children here actually thought when he put on the television he was going to watch "Born Free," a story of lion cubs which had been a serial they had been running just before this was put on.



*Appendix I*

I submit, your Honor—

THE COURT: Is there anything else that you offer to prove?

MR. LEWIS: And the mother will testify, of course, concerning her child.

There will be others that will testify as to the condition of the child. The child herself will testify, and that will be the extent of our proof."